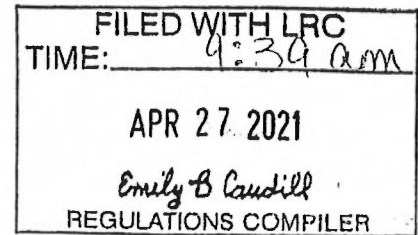


NOTICE

Amendment to 803 KAR 2:122, Abatement, was filed with the Legislative Research Commission on April 27, 2021.

The amendment is posted at <https://legislature.ky.gov>. Select the Kentucky Law Tab, Kentucky Administrative Regulations, KAR List by Title, then Title 803 Labor Cabinet and scroll down to the regulation under Chapter 2 Occupational Safety and Health.

Changes to the regulation and public hearing information is available at the aforementioned website or in the pages below following this notice.



1 LABOR CABINET

2 Department of Workplace Standards

3 Division of Occupational Safety and Health Compliance

4 Division of Occupational Safety and Health Education and Training

5 (Amendment)

6 803 KAR 2:122. Abatement [~~Application for extension of abatement~~].

7 RELATES TO: KRS 338.141

8 STATUTORY AUTHORITY: KRS 338.051, 338.061 [~~KRS Chapter 13A~~]

9 NECESSITY, FUNCTION, AND CONFORMITY: KRS 338.051(3) requires the Kentucky
10 Occupational Safety and Health Standards Board to promulgate occupational safety and health
11 administrative regulations and authorizes the chairman to reference federal standards without
12 board approval if necessary to meet federal time requirements. KRS 338.061 authorizes the
13 board to establish, modify, or repeal standards and reference federal standards. [The
14 Commissioner of the Department of Workplace Standards is empowered to extend abatement
15 periods established pursuant to KRS 338.141(2) and 803 KAR 2:120. The function of this] This
16 administrative regulation establishes [is to detail] the form of the application for extension of
17 abatement, steps necessary to make application, content of the application, form and timing for
18 the ruling of the Commissioner of the Department of Workplace Standards on the application,
19 and, appeal available to the parties adversely affected by the decision on the application. Section
20 1. (1) "Abatement" means action by an employer to comply with a cited regulation, standard,
21 statute, or order to eliminate a hazard identified by the Division of Occupational Safety and

Health Compliance.

(2) "Abatement date" means:

(a) For an uncontested citation item, the later of:

1. The date in the citation for abatement of the violation; or

2. The date approved by Division of Occupational Safety and Health Compliance or established in litigation as a result of a petition for modification of the abatement date (PMA); or

3. The date established in a citation by an informal settlement agreement.

(b) For a contested citation item for which the Kentucky Occupational Safety and Health Review Commission (KOSHRC) has issued a final order affirming the violation, the later of:

1. The date identified in the final order for abatement; or

2. The date computed by adding the period allowed in the citation for abatement to the final order date;

3. The date established by a formal settlement agreement.

(3) "Affected employees" means employees who exposed to a hazard identified as violation in a citation.

(4) "C.F.R." means Code of Federal Regulations.

(5) "Commissioner" is defined by 803 KRS 338.015(7).

(6) "Compliance officer" means a person authorized by the commissioner to conduct occupational safety and health inspections and investigations.

(7) "Employee" is defined by KRS 338.015(2).

(8) "Employer" is defined by KRS 338.015(1).

(9) "Final order date" means:

(a) For an uncontested citation item, the 15th working day after the employer's receipt of the

citation;

(b) For a contested citation item:

1. The 30th day after the date a decision or order of a commission hearing officer has been docketed with the commission, unless a member of the commission has directed review; or

2. When review has been directed, the date the commission issues its decision or order disposing of all or pertinent part of a case; or

3. The date an appeals court issues a decision affirming the violation in a case when a final order of the review commission has been stayed.

(10) "Movable equipment" means a hand held or non-hand held machine or device, powered or unpowered, used to do work and moved within a worksite or between worksites.

(11) "Review commission" is defined by KRS 338.015(8).

(12) "Working days" means Monday through Friday and does not include Saturday, Sunday, federal, or state holidays, as well as the day of receipt of notice.

Section 2. Extension or Modification of Abatement. (1) An employer may apply for an [make application for] extension or modification of abatement [date] with the commissioner or designee [Commissioner of the Department of Workplace Standards or his designee the Director of Compliance,] when the employer [has] made a good faith effort to comply with the abatement requirements [of a citation,] but abatement is not [has not been] completed due to factors reasonably beyond the employer's [his] control.

(2) The [Where] application for extension or modification of abatement [is made, said application] shall be made no [filed not] later than 4:30 p.m. Eastern Time on [the close of] the day [on which] abatement is required [was originally required].

(3) A later filed petition shall be accompanied by the employer's written statement of exceptional

1 circumstances explaining the delay.

2 (4) The application for extension or modification of abatement shall be posted for ten (10)
3 working days in a conspicuous location where all affected employees have notice or near the
4 location where the violation occurred [~~A later filed petition shall be accompanied by the~~
5 ~~employer's written statement of exceptional circumstances explaining the delay~~].

6 (5) [Section 2.] An application for extension or modification of abatement shall [~~may~~] be in
7 writing or may be made orally when [~~where~~] time does not permit a written application [~~writing~~].

8 (6) When an [~~Where~~] application for extension or modification of abatement is made orally, a
9 written application shall follow the [~~said~~] oral request within three (3) working days.

10 (7) Every [~~The~~] application for extension or modification of abatement shall include [~~the~~
11 ~~following information~~]:

12 (a) [(1)] All steps taken by the employer, and the dates of such action, in an effort to achieve
13 compliance during the prescribed abatement period.

14 (b) [(2)] The specific additional [~~abatement~~] time or modification necessary [~~in order~~] to achieve
15 compliance.

16 (c) [(3)] The reason [~~s-such~~] additional time or modification is necessary [~~, including the~~
17 ~~unavailability of professional and technical personnel or materials and equipment, or because~~
18 ~~necessary construction or alteration of facilities cannot be completed by the original abatement~~
19 ~~date~~].

20 (d) [(4)] All [~~available~~] interim steps implemented [~~being taken~~] to safeguard [~~the~~] employees
21 against the [~~cited~~] hazard [~~during the abatement period~~]. (e) Certification the application for
22 extension or modification of abatement was posted for ten (10) working days and, if appropriate,
23 provided to the authorized representative of affected employees including the date the posting

1 and service were made.

2 (8)(a) Affected employees or their representatives may file a written objection to the application
3 with the commissioner within ten (10) working days of the date of posting of such petition or
4 service upon an authorized representative.

5 (b) Failure to file an objection within ten (10) working days of the date of posting of such
6 petition or service upon an authorized representative, shall constitute a waiver of any further
7 right to object to the application.

8 (9) [Section 3.] The commissioner or designee [Commissioner of the Department of Workplace
9 Standards or his designated representative, the Director of Compliance,] shall rule on the
10 application for extension or modification of abatement within three (3) working days of receipt
11 of the application [same].

12 ~~(10) [Where extension is granted, amended citation shall issue and the employer shall post the~~
13 ~~amended citation at or near the same location as the original citation as under 803 KAR 2:125.~~

14 Adversely affected employees may appeal an extension or modification of abatement pursuant to
15 KRS 338.141 ~~[(1) and rules of the KOSHR]~~.

16 (11) When an application for extension or modification of abatement ~~[(2) Where extension]~~ is
17 denied, the employer may ~~[adversely affected employers may shall have right of]~~ appeal
18 pursuant to [as under] KRS 338.141 [(1) and rules of the KOSHR].

19 Section 3. Abatement certification. (1) Within ten (10) calendar days after the abatement date,
20 the employer shall certify to the commissioner that each cited violation is abated, except as
21 provided in paragraph (2) of this section.

22 (2) The employer is not required to certify abatement if the compliance officer, during the on-site
23 portion of the inspection:

1 (a) Observes, within twenty-four (24) hours after a violation is identified, that abatement
2 occurred; and

3 (b) The citation states that abatement occurred.

4 (3) The employer's certification that abatement is complete shall include, for each cited violation,
5 in addition to the information required by this administrative regulation, the date and method of
6 abatement and a statement that affected employees and their representatives have been informed
7 of the abatement.

8 Section 4. Abatement documentation. (1) The employer shall submit documents demonstrating
9 that abatement is complete for each cited violation.

10 (2) Documents demonstrating that abatement is complete may include evidence of the purchase
11 or repair of equipment, photographic or video evidence of abatement, or other written records.

12 Section 5. Abatement plan. (1) The commissioner may require an employer to submit an
13 abatement plan when the time permitted for abatement is more than ninety (90) calendar days.

14 (2) The citation shall state that an abatement plan is required.

15 (3)(a) The employer shall submit an abatement plan for each cited violation within twenty-five
16 (25) calendar days from the final order date when the citation indicates that such a plan is
17 required.

18 (b) The abatement plan shall identify the violation and the steps to be taken to achieve abatement
19 including a schedule for completing abatement and, where necessary, how employees will be
20 protected from exposure to the hazard or violative condition until abatement is complete.

21 (3) Progress reports. (a) An employer required to submit an abatement plan may be required to
22 submit periodic progress reports for each cited violation.

23 (b) If an employer is required to submit periodic progress reports, the citation shall indicate:

1. That periodic progress reports are required and the citation items for which they are required;
 2. The date the initial progress report shall be submitted, which may be no sooner than thirty (30) calendar days after submission of an abatement plan;
 3. Additional progress reports that are required; and
 4. The dates additional progress reports shall be submitted.
- (c) For each violation, the progress report shall identify the action taken to achieve abatement and the date the action was taken.
- Section 6. Employee notification. (1) The employer shall inform affected employees and their representative about abatement activities by posting a copy of each document submitted to the commissioner or a summary of the document near the place where the violation occurred.
- (2) When posting does not effectively inform employees and their representatives about abatement activities, the employer shall:
- (a) Post each document or a summary of the document in a location where it is readily observable by affected employees and their representatives; or
 - (b) Take other steps to communicate fully to affected employees and their representatives about abatement activities.
- (3)(a) The employer must inform employees and their representatives of their right to examine and copy all abatement documents submitted to the commissioner.
- (b) An employee or an employee representative must submit a request to the employer to examine and copy abatement documents within three (3) working days of receiving notice that documents were submitted to the commissioner.
- (c) The employer shall comply with an employee or employee representative request to examine and copy abatement documents within five (5) working days of receiving the request.

(4)(a) The employer shall ensure that notice to employees and employee representatives is provided at the same time or before the information is provided to the commissioner.

(b) The employer shall ensure that abatement documents are:

1. Not altered, defaced, or covered by other material; and

2. Remain posted for three (3) working days after submission to the commissioner.

Section 7. Transmitting abatement documents. (1) The employer shall include in each submission:

(a) The employer's name and address;

(b) The inspection number;

(c) The citation and item number;

(d) A statement that information submitted is accurate; and

(e) The signature of the employer or the employer's authorized representative.

(2) The postmark date is the date of submission for mailed documents.

(3) For documents transmitted by other means, the date the commissioner receives the document is the date of submission.

Section 8. Moveable equipment. (1) The employer shall attach a warning tag or a copy of the citation to the operating controls or to the cited component of equipment moved within the worksite or between worksites.

(2) Attaching a copy of the citation meets the tagging requirement of this administrative regulation as well as the posting requirement established in 803 KAR 2:125.

(3) The employer shall attach a warning tag that:

(a) Properly warns employees about the nature of the violation involving the equipment; and

(b) Identifies the location of the citation issued.

1 (4)(a) If the violation is not abated, a warning tag or copy of the citation must be attached to hand
2 held equipment immediately after the employer receives the citation.

3 (b) If the violation is not abated, a warning tag or copy of the citation must be attached to non-
4 hand held equipment prior to moving the equipment within or between worksites.

5 (5) For the construction industry, a tag designed and used in accordance with 29 C.F.R.
6 1926.20(b)(3) and 29 C.F.R. 1926.200(h) meets the requirements of this section when the
7 information required by this section is included on the tag.

8 (6) The employer must ensure the tag or copy of the citation attached to movable equipment is
9 not altered, defaced, or covered, or obscured by other material.

10 (7) The employer shall ensure the tag or copy of the citation attached to movable equipment
11 remains attached until:

12 (a) The violation is abated and all abatement verification documents required by this
13 administrative regulation are submitted to the commissioner; or

14 (b) The cited equipment is permanently removed from service or is no longer in the employer's
15 control; or

16 (c) The review commission issues a final order vacating the citation.

17 Section 9. The commissioner shall assume authority to modify abatement pursuant to KRS
18 338.141(2) when review commission jurisdiction expires.

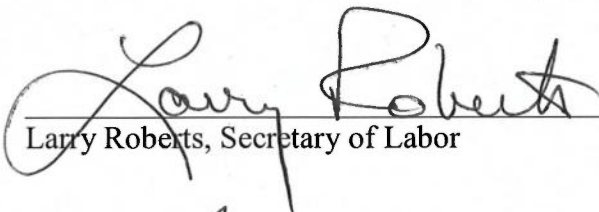
19 Section 10. Incorporation by Reference. (1) The following nonmandatory appendices to 29
20 C.F.R. 1903.19 are incorporated by reference:

21 (a) Appendix A, Sample Abatement Certification Letter;

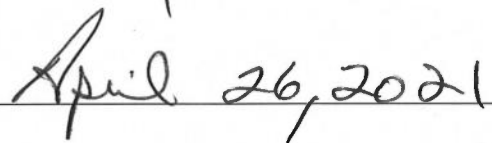
22 (b) Appendix B, Sample Abatement Plan or Progress Report; and

23 (c) Appendix C, Sample Warning Tag.

As approved by



Larry Roberts, Secretary of Labor



Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on July 21, 2021 at 10:00 am (ET). The meeting will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 1, subparagraph (8) b (2020) and the continuing state of emergency. Public access to the meeting will be available at

<https://us02web.zoom.us/j/86731399141?pwd=Q2VOcDQ3ZkVBaUtoNERCMDNlKzZlZz09>, password 446261; or by telephone at (713) 353-0212, (888) 822-7517 toll free, conference code 194378.

Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through July 31, 2021. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Robin Maples, OSH Standards Specialist, Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, Telephone: (502) 564-4107, Facsimile: (502) 564-4769, Email: Robin.Maples@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation Number: 803 KAR 2:122

Contact person: Robin Maples (502) 564-4107, Robin.Maples@ky.gov, Facsimile: (502) 564-4769

(1) Provide a brief summary of:

(a) What this administrative regulation does: Section 1 of this administrative regulation, effective since December 11, 1974, defines terms. Section 2 establishes the requirements for an extension or modification of abatement. This amendment updates existing language and articulates 29 CFR 1903.14 requirements. Sections 3, 4, 5, 6, 7, and 8 establish other abatement related requirements pursuant to 29 CFR 1903.19 that were found in 803 KAR 2:060, Employer's responsibilities. Communicating all abatement requirements in a single regulation is more efficient for employers and employees. This amendment also updates this administrative regulation to meet KRS Chapter 13A considerations and was reviewed in accordance with House Bill (HB) 50 from the Regular Session of the 2017 General Assembly.

(b) The necessity of this administrative regulation: This administrative regulation was reviewed in accordance with HB 50 from the Regular Session of the 2017 General Assembly. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), and 29 CFR 1956.2(a), which all require Kentucky OSH regulations to be as effective as the federal requirements. This regulation is equivalent.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 338.051(3) requires the Kentucky Occupational Safety and Health Standards Board to promulgate occupational safety and health administrative regulations. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), and 29 CFR 1956.2(a), which all require Kentucky OSH regulations to be as effective as the federal requirements. This regulation complies and conforms with the authorizing statutes.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation promotes worker safety and health throughout Kentucky and ensures the state is as effective as the federal requirement. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), and 29 CFR 1956.2(a), which all require Kentucky OSH regulations to be as effective as the federal requirements. This regulation is equivalent.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: Section 1 of this administrative regulation, effective since December 11, 1974, defines terms. Section 2 establishes the requirements for an extension or modification of abatement. This amendment

updates existing language and articulates 29 CFR 1903.14 requirements. Sections 3, 4, 5, 6, 7, and 8 establish other abatement related requirements pursuant to 29 CFR 1903.19 that were found in 803 KAR 2:060, Employer's responsibilities. Communicating all abatement requirements in a single regulation is more efficient for employers and employees. This amendment also updates this administrative regulation to meet KRS Chapter 13A considerations and was reviewed in accordance with HB 50 from the Regular Session of the 2017 General Assembly.

(b) The necessity of the amendment to this administrative regulation: This administrative regulation was reviewed in accordance with HB 50 from the Regular Session of the 2017 General Assembly. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), and 29 CFR 1956.2(a), which all require Kentucky OSH regulations to be as effective as the federal requirements. This regulation is equivalent. Amendments to this regulation are technical and intended to maintain consistency with other regulations.

(c) How the amendment conforms to the content of the authorizing statutes: KRS 338.051(3) requires the Kentucky Occupational Safety and Health Standards Board to promulgate occupational safety and health administrative regulations. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), and 29 CFR 1956.2(a), which all require Kentucky OSH regulations to be as effective as the federal requirements. This regulation complies and conforms with the authorizing statutes.

(d) How the amendment will assist in the effective administration of the statutes: This amendment maintains consistency with the federal requirements. This amendment promotes employee health and safety throughout Kentucky and keeps the state program consistent with the federal program.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation affects all employers in the Commonwealth covered by KRS Chapter 338.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including: (a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional compliance duties are imposed and no immediate action is required.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no additional cost to the OSH Program to implement this administrative regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Restructuring to communicate all abatement requirements in one (1) regulation provides

employers and employees with a clear understanding of the requirements. This administrative regulation promotes worker safety and health throughout Kentucky and ensures the state is as effective as the federal requirement.

(5) Provide an estimate of how much it will cost to implement this administrative regulation: (a) Initially: There is no cost to the OSH Program to implement this administrative regulation.

(b) On a continuing basis: There is no continuing cost to the OSH Program to implement this administrative regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current state and federal funding.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new or by the change if it is an amendment: There is neither an increase in fees nor an increase in funding necessary to implement this amendment.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation neither establishes any fees nor directly or indirectly increases any fees.

(9) TIERING: Is tiering applied? Tiering is not applied. All employers covered by KRS Chapter 338 are treated equally.

FEDERAL MANDATE ANALYSIS COMPARISON

Regulation Number: 803 KAR 2:122

Agency Contact: Robin Maples (502) 564-4107, Robin.Maples@ky.gov, Facsimile: (502) 564-4769

1. Federal statute or regulation constituting the federal mandate.

Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1956.2(a)

2. State compliance standards.

The Kentucky OSH Program is mandated to be at least as effective as the federal requirement. Accordingly, in order to maintain the state program as effective as the federal program, Kentucky must adopt the federal requirement or develop an equivalent standard. This regulation is equivalent.

3. Minimum or uniform standards contained in the federal mandate.

Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1956.2(a)

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements: This amendment does not impose stricter requirements.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number: 803 KAR 2:122

Contact Person: Robin Maples (502) 564-4107, Robin.Maples@ky.gov, Facsimile: (502) 564-4769

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?

This administrative regulation affects any unit, part, or division of state or local government covered by KRS Chapter 338.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 338.051, KRS 338.061, Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1956.2(a)

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

None.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?

None.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?

None.

(c) How much will it cost to administer this program for the first year?

There are no costs associated with this amendment.

(d) How much will it cost to administer this program for subsequent years?

There are no costs associated with this amendment.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Unknown.

Expenditures (+/-): Unknown.

Other explanation: This amendment does not impose any additional requirements or expenditures.